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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

RONALD J. MCINTOSH,)	
)	
Plaintiff,)	
)	
VS.)	NO. CV 09-00750-CRB
)	
ATTORNEY GENERAL ERIC H.)	
HOLDER, JR., ET AL.,)	
)	
Defendants.)	
_____)	

San Francisco, California
Friday, March 24, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Pamela A. Batalo, CSR No. 3593, RMR, FCRR
Official Reporter

Friday - March 24, 2017

9:56 a.m.

P R O C E E D I N G S

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THE CLERK: Calling CV 09-750, McIntosh vs. Holder,
et al.

Counsel, please state your appearances for the record.

MR. SHAPIRO: Good morning. David Shapiro for
Mr. McIntosh.

THE COURT: Mr. Shapiro?

MR. SHAPIRO: Yes.

THE COURT: You're on that side of the --

MR. SHAPIRO: Plaintiff's side.

THE COURT: That's the Government's side. Is this by
force of habit that you took that side?

MR. SHAPIRO: It might have been, but it's been quite
a while.

THE COURT: Okay. Just giving him a rough time.

MS. CRITCHFIELD: Pam Critchfield for the State of
California Attorney General's Office.

THE COURT: Good morning. Thank you so much.

Well, welcome to the oldest case I have. It must seem
like an old case for all of you, both of you; right?

Here is what I now see the playing field out there -- and
you can -- if you think I'm wrong, you should be heard on this
issue.

1 There are two, what I call, unexhausted or new claims.
2 One is Quartermain -- Quartermain's --

3 **MR. SHAPIRO:** I think that's right.

4 **THE COURT:** -- mental health history. And second is
5 any evidence or information regarding the relationship between
6 Quartermain and Young or Younge.

7 **MS. CRITCHFIELD:** Younge.

8 **THE COURT:** Okay. Those are unexhausted, as I
9 understand the record.

10 The exhausted claims -- there is an argument that there is
11 new evidence with respect to the exhausted claims. One is the
12 intimidation of would-be alibi witness David Greene.

13 Second is the so-called -- these are just allegations --
14 coaching of the prosecution witness, Deborah Chandler.

15 And the third is Younge's criminal history.

16 Those are exhausted claims, but the plaintiff says that
17 they are -- that he has new evidence supporting those claims.

18 In a sense, this case wouldn't present a problem if the
19 California courts had denied the appellate relief based upon
20 substance, but in fact they denied it based on a procedural
21 determination, as I understand it, and that further complicates
22 the situation.

23 So my question is, which I'd like you both to address --
24 is why shouldn't I stay -- it's called stay and abey, A-B-E-Y,
25 if that's the right pronunciation -- the proceedings to allow

1 McIntosh to present his unexhausted claims to state court as
2 well as new evidence regarding his exhausted claims? Because
3 the latter might be enough to overcome the timeliness bars
4 under state law. They may or may not. I don't know.

5 And that would be the course that I would propose at this
6 point. So I want your views as to why that's not the right way
7 to proceed or some other alternative, if you have it.

8 And we have the whole morning, so that's probably the good
9 news and the bad news. So take your time, whoever wants to
10 speak, and then I will allow you to go back and forth on these
11 issues until we're all exhausted, no pun intended.

12 **MR. SHAPIRO:** I think that --

13 **THE COURT:** Go ahead, Mr. Shapiro. We will hear from
14 you first, and then I will hear from the State.

15 **MR. SHAPIRO:** I think that would not be the right
16 procedure. My recollection from the State 2006 habeas petition
17 is that McIntosh raised all of the same things that he raised
18 in his 2009 federal petition, and that included the undisclosed
19 relationship between Younge and Quartermain.

20 Now, the mental health evidence about Quartermain
21 certainly is something that we learned about here for the first
22 time, so I agree with Your Honor, that's new evidence. But --

23 **THE COURT:** Isn't that a new claim?

24 **MR. SHAPIRO:** No. Because what it gets to is
25 essentially the claim that Quartermain was completely

1 unreliable and never -- and those hearsay statements never
2 should have come in. It's just additional evidence.

3 And the State didn't say, "Well, you didn't have enough
4 evidence so your 2006 petition is denied." It said, "You're
5 too late to raise anything about this."

6 So I could come in with a truckful of new evidence and the
7 State would still argue to the state court "he's too late"
8 which is what they argued back in state court in response to
9 the 2006 petition.

10 So to send us back there or to send McIntosh back to state
11 court would only result in the exact --

12 **THE COURT:** But I think what you are saying is exactly
13 what the State would say, but I think the State's wrong when
14 the petition is denied on procedural grounds. When it's denied
15 on procedural grounds, I think you're entitled to go back and
16 argue it in the state because of new evidence. That's what I
17 understand to be the case, but you say no, that's not true?

18 **MR. SHAPIRO:** I don't think so. On page 2 and 3 of
19 our --

20 **THE COURT:** All right. Let me take a look.

21 **MR. SHAPIRO:** 2 and 3 of my reply brief on the summary
22 judgment motion --

23 **THE COURT:** Hold on. Hold on. I've got to get it.

24 **MR. SHAPIRO:** That was Doc. 225.

25 **THE COURT:** Yes. I have it. Page 2 and 3.

1 **MR. SHAPIRO:** I cited to a few cases that say that you
2 don't have to keep sort of bouncing back and forth. If
3 evidence is developed during the federal proceeding, you don't
4 have to bounce back to state court and say "Well, what about
5 this and what about this?" You know, would that change your
6 mind about a procedural, a timeliness issue?

7 **MS. CRITCHFIELD:** What page?

8 **MR. SHAPIRO:** Pages 2 and 3 of my page numbers.

9 **THE COURT:** So you say under the *Slutzker vs.*
10 *Johnson* --

11 **MR. SHAPIRO:** *Slutzker, Gimenez vs. Ochoa, Gonzalez*
12 *vs. Wong.*

13 The Ninth Circuit, the Third Circuit have said no, if you
14 ended up in federal court because the state denied a state
15 petition on timeliness or procedural grounds, you can finish in
16 federal court. You don't have to keep bouncing back and forth.

17 And I don't think the State's ever going to say here,
18 "Don't worry, we won't argue these new claims are untimely." I
19 mean, if they committed to that here and they were to say, "I'm
20 going to tell the state court I'm never going to" -- you know,
21 "these are not untimely claims because we just told the
22 defendant about -- the inmate about these things," and she's
23 not going to say that because I don't think a State prosecutor
24 would say that. Of course they're going to try to preserve
25 every argument they have to try to defeat the petition.

1 **THE COURT:** So you say I can consider the new
2 evidence?

3 **MR. SHAPIRO:** Yes.

4 **THE COURT:** Under --

5 **MS. CRITCHFIELD:** May I interject?

6 **THE COURT:** I just need a moment --

7 **MS. CRITCHFIELD:** Okay.

8 **THE COURT:** So, Mr. Shapiro, are you saying that I can
9 conduct a *de novo* review of the claims about Quartermain's
10 mental illness?

11 **MR. SHAPIRO:** Yes.

12 **THE COURT:** Well, let's hear from the State. What do
13 you think?

14 **MS. CRITCHFIELD:** It is true that the evidence that
15 the petitioner brings to overcome the bar, the procedural
16 default, that evidence in federal court does not have to have
17 been before the state court.

18 If the Court -- a court rules then that the bar is
19 overcome, which is where we are in this process, that he has
20 overcome the bar by showing cause and prejudice, we've never
21 considered the merits of this petition.

22 **THE COURT:** Right.

23 **MS. CRITCHFIELD:** And my argument is it's untimely
24 and, in the alternative, it's procedurally defaulted. And I
25 would like to expand on that, but I'll answer your question

1 first.

2 It's true that the evidence that has been brought up here
3 or that's been discovered here over the last three years during
4 discovery, yeah, that wasn't before the state court, and the
5 Court can certainly consider that in deciding whether the bar
6 has been overcome.

7 To the extent that it supplements any of the claims on the
8 merits, which is of course what petitioner is proposing, that
9 has never -- those facts have never been before the state
10 court. That would -- those claims would be unexhausted, even
11 if they're additional facts to a claim. So that would have to
12 go back to be exhausted in state court.

13 And I can give you a detailed analysis of what's been
14 exhausted and what hasn't been. I'd prefer to do that in
15 briefing, I believe, than just standing here. Some of the
16 claims -- many of the claims were exhausted and some of the
17 claims were denied in a petition by the California Supreme
18 Court denying a petition for review way back in 1992.

19 Those claims were exhausted and -- on the merits, the
20 state court reached those claims on the merits. There are
21 maybe two or three in Mr. McIntosh's 2009 petition. That's the
22 only habeas petition before this Court at this time. There is
23 no other habeas -- he hasn't filed an amended petition. He
24 needs to get leave of the Court and then file an amended
25 petition, adding all his claims, supplementing his claims.

1 Then I would respond, the State would respond, saying this is
2 unexhausted, this is unexhausted, and then addressing them on
3 the merits, and then the Court would decide what they wanted to
4 do.

5 **THE COURT:** So you think that's the better way to
6 proceed?

7 **MS. CRITCHFIELD:** Yes, number one, but actually --

8 **THE COURT:** Grant -- or he's not asking for it. I
9 don't know whether he's asking for it or not, but direct
10 plaintiff to file an amended petition with all of these claims
11 in it --

12 **MS. CRITCHFIELD:** Yes. If you get that far. If you
13 decide, Your Honor, that this petition is not untimely and/or
14 procedurally barred -- that is the question before the Court at
15 this point. If you decide that it is timely and that it is not
16 procedurally barred, then, yes, I think he needs to file an
17 amended petition because there is no way that the State can
18 look at the claims that he made -- that Mr. McIntosh made in
19 2009 and then somehow supplement those -- read a crystal ball
20 to supplement those in the way that he wants them supplemented.
21 He would have to file a new Amended Complaint, and then we
22 could look at that and tell you "this is unexhausted, this is
23 unexhausted, this was decided on the merits, this was decided
24 by a procedural bar."

25 But, Your Honor, before you get there, we need -- I would

1 like to propose that this petition is untimely, and it's
2 untimely -- you don't even have to reach the procedural bar
3 issue. He has not shown he's entitled to statutory tolling,
4 equitable tolling, the equitable exception of actual innocence
5 or delayed discovery. He has not shown any of that. This is a
6 run-of-the-mill untimely petition.

7 He didn't file -- he didn't start filing in state court
8 until 2006. That's when he filed his first petition in the
9 San Mateo County Superior Court. His conviction was final in
10 1992. AEDPA was enacted in '86. The statute ran on the 24th
11 of April in 1997. He did not even get to superior court until
12 2006. This petition is untimely. We don't need to reach the
13 merits, whether the '09 petition or an amended petition.

14 In the alternative, Your Honor, it is procedurally barred.
15 You don't need to reach the procedural bar issue. It was --
16 it's -- the state -- it's untimely under the AEDPA. The state
17 happened to deny with -- deny the petition in -- before the
18 California Supreme Court, and the California Court of Appeal
19 denied the petition with a cite to *In Re Robbins*.

20 The Supreme Court subsequently decided that's a good bar,
21 *Walker vs. Martin*. They said yes, California has a right to --
22 and it's used properly. And so I argued in the alternative
23 that the petition is procedurally barred.

24 But the timeliness issue is straightforward, it's simple,
25 it's the best way forward. That needs to be considered first

1 before we talk about him filing an amended petition and whether
2 we're going to consider anything on the merits. We're not at
3 the merits.

4 **THE COURT:** Mr. Shapiro, why isn't it timely barred?

5 **MR. SHAPIRO:** Well, I think Ms. Critchfield raised a
6 few different things besides what your question was --

7 **THE COURT:** I think that's right, but, I mean, what
8 counsel is saying is "Look, Judge, you're getting ahead of this
9 game a little bit. You have to decide that it's not -- that
10 it's timely and you have to decide that it's not procedurally
11 barred."

12 And let's take the first step first because she says
13 that's just clear; it's simply not timely.

14 **MR. SHAPIRO:** Well, I think the simplest answer -- and
15 I've raised several reasons why it's not untimely here. But
16 the simplest one for me to understand is the State withheld
17 evidence, the federal government withheld the exculpatory
18 evidence, the impeachment evidence. The statute of limitations
19 begins to run when that's disclosed. That actually -- some of
20 it was disclosed during these proceedings.

21 But it's more than that. It's more than that. If you
22 look back at the procedural history of what McIntosh was doing
23 and doing on his own from prison, which is, you know -- over
24 and over again the Ninth Circuit says you have to cut people
25 like him some slack. He filed within a year of the adoption of

1 AEDPA in this court, and I think it was originally assigned to
2 Judge Walker and then became assigned to Your Honor.

3 If you look back at the filings in that case, McIntosh
4 believed -- and there's one -- one document I think I did not
5 attach. It's Document No. 14 in that 1997 petition where he
6 says -- first he moves to amend to take out his unexhausted
7 claims. Then Your Honor says in the first order, "I've got to
8 dismiss," you know, "these mixed petitions under the *Rose vs.*
9 *Lundy* test," which of course ends up being changed over time.
10 Right?

11 So then McIntosh writes to the Court. He files a motion
12 to withdraw. And he said as he understands it -- and he files
13 this -- in his motion to amend, he files this several-page
14 document essentially asking for legal advice, and we know the
15 Court is not going to give an inmate legal advice. But
16 struggling to understand what -- what is this new AEDPA thing
17 and how does it work?

18 And he says, "The Court's order" -- and this is Document
19 14. I'm 99 percent sure. "The Court's order of July 13, 1998
20 indicated McIntosh has the choice of withdrawing the current
21 2254, returning to state court to fully exhaust all claims,
22 then, if necessary, resubmitting one all-inclusive habeas
23 corpus in federal court." And then the Court issued an order
24 essentially saying, "Yes, do that."

25 So the State cited to a couple -- or three cases from the

1 Ninth Circuit that say once you dismiss a petition, it's dead;
2 right? You don't revive it. But what the State didn't cite
3 to -- and I fault myself for not citing it to Your Honor in my
4 reply because I just missed it -- a case decided the same year
5 as that *White vs. Greene* case or *Greene vs. White* case that
6 said an original petition is dismissed -- a case involving
7 Michael Anthony, the same Michael Anthony who's involved in our
8 case, where the Ninth Circuit said that a court has the
9 equitable power to treat the new petition, the later-filed
10 petition, *nunc pro tunc* filed as of the one that had been
11 dismissed when there was a mistake made, whether it was --

12 **THE COURT:** What's the cite?

13 **MR. SHAPIRO:** I have copies. It's 236 F.3d 568. And
14 that case has been reaffirmed by the Ninth Circuit several
15 times.

16 So, you know, putting aside the cause and prejudice test
17 and the actual innocence test, you have a man sitting in prison
18 doing his best to follow guidance from the Court, guidance from
19 the statute, and probably guidance from, you know, jailhouse
20 lawyers, "How do I make sure my claim gets filed?" And what he
21 filed in that 1997 petition was "These two people who basically
22 testified against me, Quartermain and Younge, they're
23 incredible, they were accomplices." That's the essence of his
24 case now. Now there is a lot more evidence to back it up.

25 **MS. CRITCHFIELD:** Actually, that's not true. That's

1 not right.

2 **THE COURT:** What's not true?

3 **MS. CRITCHFIELD:** The '97 petition did not include
4 claims about Quartermain and Younge. The '97 petition was
5 basically claims -- I can tell you what the claims were.

6 **MR. SHAPIRO:** Well, can I finish my point?

7 **MS. CRITCHFIELD:** I'm sorry.

8 **THE COURT:** Yes. Go ahead.

9 **MR. SHAPIRO:** It does, and we can all look at it, but
10 it definitely -- he definitely did in the way that -- in a way
11 that an inmate would write. What he wrote was --

12 **THE COURT:** Well, counsel is referring to the petition
13 and stating that the petition didn't have this in it.

14 **MS. CRITCHFIELD:** Right. So the '97 petition raised
15 three claims that were unexhausted and four claims that didn't
16 state a federal claim. He never stated any constitutional --
17 federal constitutional violation. So you dismissed it without
18 prejudice, denied it without prejudice, for him to return to
19 state court and exhaust and then return back to federal court.

20 He waited nine years until 2006 --

21 **MR. SHAPIRO:** Well, actually none of that is true,
22 Your Honor, I mean, if we're going to interrupt each other.
23 Here, I found it.

24 **THE COURT:** Let's let Mr. Shapiro finish.

25 **MS. CRITCHFIELD:** Okay.

1 **MR. SHAPIRO:** So in his petition at page 20, he said,
2 "The jury instructions gave Younge's testimony more credibility
3 than it deserved." These are examples that I jotted in my
4 notes. The petition at 25, "The fact that Quartermain lied to
5 Younge and/or Younge lied to the jury, surely there was to be
6 some indicia of reliability before hearsay statements can be
7 introduced to the jury."

8 Now, his legal theory was the trial court had made errors
9 in admitting hearsay statements or in giving a jury instruction
10 that didn't call Younge an accomplice, didn't give the
11 accomplice instruction. But the essence of his claim and why
12 that's important is it's the common facts that matter, not
13 legal theories that matter under that *Mayle* Supreme Court case,
14 and he raised that issue and he wanted to raise the argument in
15 this court about what the testimony was against him.

16 So then he thinks -- and I think any fair reading of your
17 order or his filings would say he thinks he can go to state
18 court and then come back. He thinks he essentially has a stay.
19 So he goes and files again in 2006, and I've outlined what
20 happened during those years. He was cooperating with the
21 federal government and with the state government, not this
22 state government, a different state government, and became a
23 witness in a high profile murder case. He thought he was going
24 to get clemency and/or a reduction of his sentence because
25 that's what he had been told.

1 At the same time, he's meeting people who are telling him
2 things about David Younge. And he eventually, when he gets an
3 investigator -- he eventually gets declarations from these
4 people. So he's acting diligently the entire time. There
5 isn't a day that he isn't trying to figure out what happened
6 and what the truth was about these witnesses against him.

7 And he files in 2006. Now, the State says, "Well, that
8 was untimely." Well, maybe it was untimely in state court
9 because that's what the state courts have said, that's
10 untimely. It doesn't matter that you didn't know it or you had
11 no access to this information. We're saying it's untimely.
12 But that doesn't bind Your Honor.

13 What we look at here is why did he have to wait so long to
14 file these declarations and file his petitions? Well, because
15 he wasn't getting any information. And there are so many cases
16 in the Ninth Circuit that have said when the State withholds
17 that evidence, that's a good cause for why he didn't file.

18 And then you look at well, how bad was it and -- to see
19 whether there was prejudice, and you couldn't get better
20 impeachment evidence than what was developed in Mr. McIntosh's
21 case.

22 You have got the FBI and the State investigator calling up
23 a cop in Marin County and convincing him not to investigate the
24 main witness in the case. That's a silver bullet if you're
25 cross-examining that person on the stand. And he didn't have

1 any of that. So you can't say well, this is just untimely or
2 that's what the State's argument is. You can't say that.

3 So that's just one thing when I say you can *nunc pro tunc*
4 consider it filed as of '97 within the AEDPA statute, but then
5 you look at all that other stuff -- the cause and prejudice
6 test, the actual innocence test -- and he is timely. Now, this
7 is getting away from your original question about exhaustion
8 and whether we have to go back to the state court.

9 And, you know, the one other point -- and then I will stop
10 talking. The one other point to address what Ms. Critchfield
11 said is I expected her to make this argument that it wasn't
12 exhausted, so in April of 2015, I filed a renewed and
13 supplemental petition and I said, "Here's a renewed and
14 supplemental petition." The State didn't say, "That's not a
15 real amended petition" or "I'm moving to dismiss it" or "That's
16 somehow inadequate." And it didn't say, "Oh, you've got to go
17 raise these new claims over in state court." It didn't say
18 anything except, "We reserve our right to some day maybe do
19 something." That's a waiver. Because if she had -- if she had
20 a complaint --

21 **THE COURT:** I don't understand that's a waiver. I
22 mean, that doesn't sound like a waiver to me.

23 **MR. SHAPIRO:** She could have said he didn't --

24 **THE COURT:** What she could have said isn't the same
25 thing as saying she therefore waived her right to say anything,

1 or at least I don't think it is.

2 **MR. SHAPIRO:** Well, we could have had this argument --

3 **THE COURT:** I know. I know. Believe me, we could
4 have had this argument in 1990 something, but nobody did.

5 **MR. SHAPIRO:** Right.

6 **THE COURT:** Or it wasn't and we're now 2017 and none
7 of us is getting younger, including the petitioner.

8 **MR. SHAPIRO:** That's right. He's an old man at this
9 point.

10 **THE COURT:** How old is he?

11 **MR. SHAPIRO:** He's probably 78. He had some very
12 serious health problems in prison as well where they had to
13 take him to a hospital and --

14 **THE COURT:** Okay.

15 Yes?

16 **MS. CRITCHFIELD:** So essentially I think the argument
17 is that the petition that was filed in '97 somehow is still
18 alive -- was still alive when he filed or still pending when he
19 filed the 2009 petition. So I'd like to go back and say that
20 the '97 petition was filed three days before the AEDPA statute
21 of limitations ran. It included mostly an exhausted -- I think
22 there was one or two -- one exhausted claim and mostly
23 unexhausted and claims that didn't state a federal claim. So
24 it was dismissed without prejudice to return to go exhaust and
25 come back.

1 The argument now is that he then did that within the nine
2 years. Nine years later, he goes back to the San Mateo
3 Superior Court and exhausts a petition that is completely
4 different, and there's -- I can lay out the claims. It's a
5 very different petition.

6 So there are several exceptions that could excuse that
7 nine-year delay. It would be statutory tolling, which I think
8 he's trying to bootstrap himself into a statutory tolling
9 argument somehow saying that you were supposed to do a stay and
10 abey order on that petition, which is completely without any
11 legal support at all. So that's a statutory tolling.

12 There is an equitable tolling, which I also hear him
13 saying, which is that there was an extraordinary circumstance
14 that stood in his way that was the "but for" cause of him not
15 returning to federal court. That's equitable tolling.

16 It appears that the "but for" -- that the extraordinary
17 circumstances that you dismissed without prejudice, and he had
18 a difficult time finding the evidence so that he could beef up
19 his claims. That is not equitable tolling.

20 **THE COURT:** Isn't he saying in that regard, giving him
21 his due -- he's saying that the evidence of -- that he needed
22 was within the State's control and the State didn't furnish it
23 to him, and so how do you --

24 **MS. CRITCHFIELD:** Yes.

25 **THE COURT:** How do you expect him to produce that

1 evidence when in fact, one, he doesn't have it, and, two, the
2 State isn't giving it to him? That's what he's saying. And
3 that's a good basis for equitable tolling.

4 **MS. CRITCHFIELD:** Well, actually, Your Honor, it's
5 delayed discovery. That exception to AEDPA is delayed
6 discovery under 2244(d)(1)(D). And that, yes -- if you find
7 some evidence that presents a new claim, you have to file the
8 petition within one year of discovering that evidence because
9 of course that happens.

10 So he -- I think that delayed discovery is probably the
11 main -- the other one is the actual innocence which is just an
12 equitable exception to the AEDPA statute of limitations. And
13 actual innocence is an extremely high bar. You have to have
14 solid evidence that you did not commit -- most likely did not
15 commit the crime.

16 In all due respect, I don't believe anything he's put
17 forward shows that, demonstrates that.

18 But going back to delayed discovery, because I think
19 probably -- I don't want to make his argument, but I feel like
20 that probably is the closest one that he can come under.

21 There are several things that are a problem with that. He
22 even gives it away himself. He claims that when he filed the
23 '97 petition, he knew that Younge perjured himself and lied
24 about this relationship, this prior relationship he had with
25 Drax Quartermain, who was the killer, the hitman.

1 He knew the delayed discovery has a very strict due
2 diligence requirement. It's when you knew or should have known
3 of the claim, that you have a year from then to bring it;
4 otherwise, the exception drives the truck through the rule.

5 So he admits it, that he knew there was some issue with
6 the Younge and -- possibly with the Younge and the Quartermain
7 relationship.

8 I actually have further proof that he knew it in the early
9 '90s, all of these claims. First of all, the Jim Greene and
10 the Debbie Chandler claims are trial claims. They were all --
11 it all -- all the information for those claims was available at
12 the time of trial. That's when you -- in 1990. That's when
13 you knew or should have known.

14 Secondly, when Mr. McIntosh filed a -- his pro se federal
15 position here in 2009, he submitted a declaration -- two
16 declarations as exhibits to that petition. One of the
17 declarations, Exhibit O, states that back in 1992 when he was
18 in federal prison serving his time for the escape conviction,
19 he met Carl Jackson who told him about the prior relationship
20 with Younge and Quartermain. And he then tried -- he hired a
21 private investigator in the '90s who didn't get very far with
22 it and then became ill and ended up not helping him.

23 So he files his position. He alludes to some of this in
24 the '97 petition. It gets dismissed without prejudice. Then
25 he waits until 2006 to file the next petition, and the excuse

1 is, "Well, the State was withholding the information." The
2 State didn't withhold any of that information, number one.
3 Number two, his excuse is "Well, it was only until then that I
4 could hire a private investigator." That doesn't get you the
5 due diligence exception. It's when you knew or should have
6 known and you have to pursue it diligently at that point. And
7 he didn't.

8 And petitioner now makes it all the State's fault. But
9 the State didn't do anything. And I will also respectfully say
10 there's nothing withheld that's of any moment.

11 So does that make sense? So he really -- he has statutory
12 tolling, equitable tolling, the delayed discovery, discovery
13 under 2244(d)(1)(D), and then the actual innocence exception.
14 That's the only thing --

15 **THE COURT:** I think I have to ask Mr. Shapiro, is the
16 delayed discovery the equitable tolling argument essentially?
17 Is that why you are saying it should be equitably tolled?

18 **MR. SHAPIRO:** It should be equitably -- the cause
19 was -- the delay of discovery was the nondisclosure of
20 evidence.

21 And if I can address Ms. Critchfield's points briefly,
22 I'll start with that last one, the Jackson meeting. He did
23 meet Carl Jackson in prison, and Carl Jackson did tell him
24 something. But the case law says you don't have to file the
25 minute you get some evidence. If he had filed his petition

1 that moment, he -- it would have been like one guy saying in
2 prison that there was a prior relationship.

3 The cases say you can work at diligently trying to get
4 information about whatever the subject matter is of your
5 Complaint. There is no question that that's -- it would be
6 crazy -- every time an inmate had a conversation with another
7 inmate and he thought it helped his case, he'd be filing a
8 petition and then another petition and then another petition
9 and then asking to supplement it. That doesn't make any sense.

10 The actual innocence test is not that he has to prove that
11 he wasn't guilty. He has to prove that the new evidence
12 undermines confidence in the verdict. And that really goes to
13 these *Napue* and *Brady* errors where the State put on false
14 testimony knowingly, where the State did not disclose
15 incredibly important information.

16 It's shocking to me that the State could stand here and
17 say that the mental state of the killer whose hearsay
18 statements came in through a slick con man and the jury
19 heard -- two of the most significant ones were later held by
20 the California Court of Appeal to have been inadmissible, that
21 that was -- it's sort of insignificant information.

22 He was a psychotic. And he suffered -- I can't remember
23 the exact phrase. There is a psychological phrase and I put it
24 in my declaration. People with this mental illness can go
25 through an innocent interaction with some people and think

1 there's all sorts of terrible things and criminality happening.
2 And that a defense lawyer could have used with respect to that
3 so-called eyeball meeting.

4 So Quartermain tells Younge, "I'm going to eyeball the
5 victim." They go to this cafeteria or restaurant, and they
6 happen to see McIntosh and -- they say they see McIntosh and
7 Anthony and Ronald Ewing. Now, the only thing the jury heard
8 in that instance was Younge saying what Quartermain said the
9 reason for the meeting was, but there was no actual meeting.
10 The prosecutor made a big deal about how they didn't interact
11 with each other. It could have been all a made-up thing in
12 Quartermain's head. The jury didn't know anything like that.

13 So the point is that this evidence that the State withheld
14 that was in its files was the -- as significant the kind -- of
15 the kind of impeachment evidence that you can get in a criminal
16 case.

17 **THE COURT:** It's hard to say -- that statement, it's
18 hard to say that's wrong. I mean, it is very significant. I
19 mean, the person is mentally ill.

20 **MS. CRITCHFIELD:** But --

21 **THE COURT:** I mean --

22 **MR. SHAPIRO:** If I could just --

23 **THE COURT:** Not say anything. Don't say anything

24 **MR. SHAPIRO:** That's right. And a crazy person like
25 him could say, "I was told to kill this guy." Right? It could

1 be completely false. But the jury didn't know it because they
2 only heard it through, you know, a con man, a guy who speaks
3 well and who had testified probably 30 times.

4 **THE COURT:** Who himself is not mentally ill. He may
5 have certain problems --

6 **MR. SHAPIRO:** He is not mentally ill.

7 **MS. CRITCHFIELD:** Actually, though, Mr. Quartermain
8 had his own trial and received the death penalty for the hit
9 that he took on Ronald Ewing. So any of the -- and that came
10 before McIntosh's trial.

11 **THE COURT:** I assume he is living today.

12 **MS. CRITCHFIELD:** No. Actually he died in 2003 on
13 death row.

14 **THE COURT:** Oh, well, that's actually how people die
15 in California.

16 **MS. CRITCHFIELD:** But not the normal way. Not the,
17 you know --

18 **THE COURT:** The State doesn't -- it's not the death
19 penalty --

20 **MS. CRITCHFIELD:** Not the death-penalty way.

21 **MR. SHAPIRO:** A couple other corrections to what
22 Ms. Critchfield said before.

23 She said that somehow McIntosh admitted that he knew
24 Younger lied about the prior relationship in 1997, but that's
25 not what he said. That's not what he said.

1 What he said was he heard it -- right? He heard it from
2 other people. And, you know, he began to pick at what the
3 State's case was, and he did it in the only way that somebody
4 who is sentenced to life without possibility of parole could do
5 it.

6 And then the only other thing that I wanted to add to what
7 Ms. Critchfield said before was that the Greene and Chandler
8 new facts were trial evidence, I think she said. But it's not
9 true. What happened with Chandler and what we detailed in my
10 declaration and all of the evidence was that she admitted
11 afterwards that the State prosecutor and the police had fed her
12 information about what she then testified about.

13 I mean, I went through this whole analysis of where --
14 where did she get this phrase that she used at McIntosh's trial
15 about two rich guys hired Quartermain to kill Ewing. It came
16 from the police. It came from the State.

17 And with respect to Greene, he couldn't know until Greene
18 admitted that he had been intimidated, and he couldn't know
19 that the State prosecutor had sent the police down to find
20 Greene in order to interview him. We didn't know that until
21 the assistant DA admitted it in response to interrogatories.

22 He didn't tell Mr. Philipsborn, who was McIntosh's lawyer,
23 "By the way, my cops, my investigators went down and
24 interviewed your witness and he's not coming." Because if you
25 look at the evidence and the way that Philipsborn did his

1 examination of the police officer, of Singleton, he was trying
2 to get him to admit that there was this nine-minute phone call
3 from the McIntosh home to the Greene home and that would
4 support his alibi because he couldn't get Greene to come to
5 court, and Singleton said, "I didn't know anything about that."
6 He didn't say, "Yeah, I interviewed that witness and I did talk
7 to him." He didn't admit it. So that's what the truth is
8 about those two witnesses.

9 And all of it goes to both the actual innocence exception
10 and the cause and prejudice tolling argument.

11 **THE COURT:** This is a procedural nightmare.

12 **MS. CRITCHFIELD:** Well, actually it's not. It doesn't
13 have to be. It doesn't have to be. And I would like to
14 again -- let's go -- let's narrow this down and talk about the
15 most direct, fast-forward way here, and I'm happy to do
16 additional briefing on this.

17 The petition is untimely under the AEDPA. He has four
18 ways that he can --

19 **THE COURT:** But you've argued that. You've argued
20 that.

21 **MS. CRITCHFIELD:** Okay. I want to say one thing about
22 this so-called evidence or this evidence of Mr. Quartermain's
23 mental health records that were diagnosed by prison officials
24 from -- between the years of 1955 and 1965, and of course,
25 remember, the trial here was 25 years later in 1990.

1 Mr. Quartermain didn't testify because he was a
2 co-conspirator, and so his statements came in through David
3 Younge, and David Younge was actually -- the jury was
4 instructed to decide if the --

5 **THE COURT:** I don't -- I'm sorry. I'm trying to
6 understand why that's a meaningful distinction. In other
7 words, I'm trying to understand that if Jones, who is severely
8 mentally ill, tells Smith X, Y and Z, and Smith comes in and
9 testifies that Jones said X, Y and Z, why it's irrelevant
10 that -- whoever the person was, I've already forgotten -- is
11 mentally ill. I don't understand that.

12 All the Rules of Evidence that I'm aware of have to
13 suggest that -- if, for example, you're making admissions
14 against penal interest, if in fact there is some exception to
15 the hearsay rule, if in fact it's statements in the furtherance
16 of a conspiracy -- so all the general rules about admissibility
17 of out-of-court statements, they're all premised on at least
18 the fact that the person who is speaking has sufficient
19 competence to say X, Y and Z, and if they're severely mentally
20 ill, I can't see that a judge would allow that in. That's --
21 do you disagree with that? Not in the context necessarily of
22 this case, but I just can't see how a judge would let that in.
23 Really?

24 **MS. CRITCHFIELD:** If, in fact, those records -- I'd
25 like to go back before we even talk about these records of the

1 mental -- the prison mental --

2 **THE COURT:** I thought you introduced -- that's what
3 you were talking about, I thought.

4 **MS. CRITCHFIELD:** Those records were disclosed during
5 this last --

6 **THE COURT:** But answer sort of my question first. If
7 the person -- if the out-of-court declarant is severely
8 mentally ill --

9 **MS. CRITCHFIELD:** At the time he made the statements.

10 **THE COURT:** That's right.

11 **MS. CRITCHFIELD:** At the time he made the statements.

12 **THE COURT:** Well, but it's a fair inference that he
13 was. In other words, I don't think he had a medical diagnosis
14 as of the day that he purportedly declared X, Y and Z, unless
15 he did. I don't know. But, I mean, I'm just saying that if,
16 in fact, the person -- it's reasonable to infer that the
17 person, when he made the statements, was suffering from a
18 mental disability that would impair his credibility and the --
19 I find it hard to believe that a trial judge would permit that
20 type of evidence to go to a jury.

21 As a general proposition -- forget the case, but you're
22 now a lawyer in front of me discussing a general proposition of
23 the law, do you disagree with that or do you agree with that?

24 **MS. CRITCHFIELD:** Yes. But that's not the facts here.

25 **THE COURT:** Okay. Fine. But at least -- because

1 Mr. Shapiro says yes, it is. I think he is saying that.

2 **MR. SHAPIRO:** Yes.

3 **THE COURT:** Unless I'm hearing something differently.

4 So if he's saying that and you say well, as a general
5 proposition that's correct, then I have a point -- I have a
6 platform at least to understand.

7 I mean, if the law were it makes no difference how
8 mentally ill a person is, you know, who makes a declaration to
9 X, and X comes in to testify, I'd say well, I sort of look at a
10 harm, prejudice, and so forth analysis and say he could have
11 gotten it in anyway even if he had known all those things. He
12 could have gotten it in anyway. The way I look at it is he
13 probably couldn't. He couldn't as a general proposition. So
14 I'm actually satisfied on that particular issue that
15 Mr. Shapiro is correct.

16 On the timeliness issue, I think I have to give some more
17 thought to it to see whether your silver bullet or whatever you
18 want to use as an analogy, you know, is really dispositive.

19 The mental illness issue, if it is a new claim, then I'm
20 not sure it's an exhausted claim. If it's sort of more
21 evidence of the old claim, then I think I would, you know --
22 arguably it was exhausted. I'm unclear as to that. Maybe you
23 can address those issues to see whether you have agreement or
24 disagreement on that issue.

25 **MS. CRITCHFIELD:** May I address the evidence -- the

1 evidence of the diagnosis of Drax Quartermain between the years
2 of 1955 and 1965 by prison officials as being mentally ill was
3 25 years before the trial and 20 -- approximately 20 years
4 before the crime, which occurred in 1984.

5 Mr. Quartermain was tried. There was no mental health
6 issues raised at his trial, and one would think if one were on
7 death row or facing a death row conviction that the mental
8 health would be an issue raised by defense counsel.

9 No. 2, I would like to elaborate or make sure the Court is
10 clear on where this mental health evidence came from. In 2014
11 this Court ordered me to have the District Attorney release
12 their files, the DA's files. The DA who tried this case is
13 long retired. I got ahold of the chief assistant. She went
14 through and culled out -- she went through, found the three
15 case files in the DA's archives, culled out anything she
16 thought was either work product or confidential. She says in
17 her declaration, "I don't have any idea what was released or
18 what was given to the defense in 1990. I didn't work on the
19 case. I'm just saying now."

20 So she held that back. Unbeknownst to me, she held back a
21 certain amount of evidence -- documents. We then realized,
22 when I asked her, that she had held them back. She then
23 released them to you and we then released -- you then released
24 them to petitioner.

25 Petitioner labels those files as the secret files, as the

1 files that were never released in 1990. But there is no
2 evidence of that. There is no evidence -- he makes a jump that
3 just because Ms. Guidotti in 2014 withheld them, culled through
4 them and she says --

5 **THE COURT:** But -- okay.

6 **MS. CRITCHFIELD:** Does that make sense?

7 **THE COURT:** Well, I understand what you're saying. So
8 I -- it makes sense from that point of view, but I'm not sure I
9 draw the same conclusion that you do, and it's a question of
10 burdens, in my view.

11 In other words, am I to presume that those files which she
12 withheld initially or in response to this proceeding were
13 actually produced to the defense lawyer during the course -- am
14 I to presume that? Or putting it the other way, am I to
15 presume that they weren't, you know?

16 **MS. CRITCHFIELD:** It's his burden.

17 **THE COURT:** Well, in other words -- in other words,
18 he -- what we need from him would be a declaration saying, "I
19 never got these." But, I mean, it's -- since we don't have
20 that -- we don't have any declaration in that sense. We don't
21 have a declaration from the prosecutor at the time saying, "I
22 furnished them." We don't have a declaration from the defense
23 lawyer saying, "I never got them," or a declaration from the
24 defendant saying, "I never saw them. To my knowledge, they
25 were never produced." Okay.

1 And you're saying we ought to -- since he has the burden
2 and since silent on that issue, I ought to take that into
3 consideration.

4 Well, I'd say that's a pretty big leap. I don't know what
5 to say. I mean, the problem I have, to be perfectly frank, is
6 the practices in different district attorneys' offices in the
7 '70s and '60s and '80s were very, very different. Some DAs
8 would say, "Come on in." I mean, I was there so I know. I
9 know the practice, at least in San Francisco, in a homicide
10 case was that nothing was withheld. Actually they made a
11 duplicate file of the homicide file and turned it over.

12 **MS. CRITCHFIELD:** Uh-huh.

13 **THE COURT:** And then if there was some secret witness
14 or, you know, witness who's confidential and so forth, we would
15 make some arrangements with respect to that. But actually I
16 never even had that. I mean, in five years of practice, I
17 never had a single document not produced. That's in
18 San Francisco.

19 San Mateo may be different. I don't have an opinion. And
20 though I know that there is a history of different districts
21 doing different things, I know they're not uniform practices
22 throughout the State of California.

23 And, by the way, this was all before there was -- well, I
24 mean, there was always *Brady* requirements. It was probably
25 before *Giglio*, but there was *Brady* and --

1 **MR. SHAPIRO:** This is after *Giglio*.

2 **MS. CRITCHFIELD:** Yes. Mr.--

3 **THE COURT:** Anyway --

4 **MR. SHAPIRO:** If I could just respond to those few
5 things?

6 **THE COURT:** Go ahead.

7 **MR. SHAPIRO:** The last one I'll address first.

8 So the defense lawyer in the case I mentioned was John
9 Philipsborn, former federal prosecutor in this district,
10 experienced defense lawyer -- I would say probably pretty
11 experienced by that time and very experienced now. He asked
12 for a hearing from the trial judge on whether the Quartermain
13 hearsay statements could come in. That was denied.

14 If he had any knowledge about the mental state of
15 Quartermain, we could be sure he would have said, "Your Honor,
16 look at this. The guy's crazy." All right. That's number
17 one. So if you're going to draw an inference from the
18 evidence, I don't know that it's my burden -- I don't know what
19 case that says when I present evidence that there are documents
20 that don't ever have appeared to have been produced to the
21 defense and here they are and they're coming in and they were
22 withheld by a supervisor at the DA's office and we don't have a
23 declaration from her that says, "I don't have a clue what was
24 turned over in this statement" --

25 **MS. CRITCHFIELD:** We do have a declaration.

1 **MR. SHAPIRO:** Excuse me.

2 She didn't actually say that.

3 And we don't have a declaration of -- Murray was contacted
4 in order to respond to interrogatories and they could have
5 asked him. I asked to depose him. I could have asked him that
6 question. I wasn't able to. The State objected to that.

7 I could ask John Philipsborn if he remembers any mental
8 health records. I think I may have. And I think he said, "No.
9 I know my client never saw any mental health records of Drax
10 Quartermain."

11 **THE COURT:** We're getting pretty far out of the
12 record, aren't we? Probably it started with me so I apologize
13 for that, but --

14 **MR. SHAPIRO:** Could I go to your question on whether
15 it's exhausted?

16 **THE COURT:** Yes.

17 **MR. SHAPIRO:** I think it is exhausted in the state
18 because the fact that we develop evidence, additional evidence,
19 that goes to Quartermain's credibility here doesn't mean you
20 have to send it back to the state every single time. I mean,
21 look how long it took us to get to the last thing, which,
22 frankly, was a bigger bombshell than the mental health records,
23 which was that they shut down a Marin County drug investigation
24 of David Younge. Right? That took us years to get to and that
25 was like drips and drabs coming from the FBI of information.

1 If every time we get some new piece of evidence you have
2 to send it back to the state, McIntosh will die in prison. And
3 that's not fair to him. And that's not what the cases say from
4 the Ninth Circuit. That if he raised the claim there,
5 especially since they didn't get to the merits --

6 **THE COURT:** I understand the argument.

7 **MR. SHAPIRO:** You know --

8 **THE COURT:** Anything further?

9 **MS. CRITCHFIELD:** Two things.

10 We don't need to reach the exhaustion issue until you've
11 decided on the timeliness issue. If they -- if you decide that
12 this was timely and he's entitled to one of the exceptions,
13 then any new facts that are used to supplement a claim are --
14 need to go back to the state court, if that's how you decide
15 you want to proceed.

16 Two things on the -- this evidence. I would ask you to
17 look at this evidence honestly. How much of it -- was it --
18 could it have possibly been prejudicial.

19 **THE COURT:** Well, let's talk about that just for a
20 minute.

21 **MS. CRITCHFIELD:** Okay.

22 **THE COURT:** Quartermain -- the statements that
23 Quartermain made -- allegedly made --

24 **MS. CRITCHFIELD:** To David Younge.

25 **THE COURT:** Yes. Are you saying that they're not --

1 they're not of great weight? I mean, they're not -- they're
2 not highly prejudicial? They --

3 **MS. CRITCHFIELD:** No, no, no. The statements -- oh,
4 no. The statements are really -- the statements that
5 Quartermain made to Younge and then Younge was able to testify
6 to them because of the co-conspirator exception, yes, that was
7 a big part of the trial.

8 **THE COURT:** Well, so that's the point.

9 **MS. CRITCHFIELD:** Well, no, it is -- Your Honor, it
10 is, except -- except this mental health evidence, how much of a
11 difference -- the DA would have gone in and said, "So,
12 Mr. Younge, isn't it true that back in 1955 to 1965 Drax
13 Quartermain was diagnosed with a mental illness? So does that
14 make you question what he said to you in 1984?"

15 **THE COURT:** It's not whether Younge -- maybe I'm
16 missing it. It's not whether Younge thought that Quartermain
17 was mentally ill, though that is sort of interesting, whether
18 he is dealing with somebody or talking to somebody who is
19 mentally ill. That's interesting. Or involved in it. That's
20 an interesting fact. No.

21 The question is the jury is sitting there trying to figure
22 out what weight, if any, to give to these statements, and then
23 they hear that the person who uttered the statements is a
24 lunatic. I mean, I -- you lose me on this one.

25 **MS. CRITCHFIELD:** But, Your Honor, he's not a lunatic.

1 **THE COURT:** Well, that he suffers -- that's a very
2 inappropriate term. That he suffers from a mental illness.

3 **MS. CRITCHFIELD:** He may have. Back from -- in '55 to
4 '65 he was diagnosed in prison --

5 **THE COURT:** But that's exactly -- exactly why we have
6 juries. Exactly why juries weigh things. Exactly how they
7 come to a conclusion how much weight, if any, to give to
8 particular evidence. I mean, I've said it for 20 years as a
9 judge and 30 years as a trial lawyer. It's the jury's
10 determination in that regard. It's extraordinarily important.

11 And it's not -- if -- I would follow you and accept what
12 you're saying if it was so incidental. You know, look, number
13 one, witnesses misrecollect. Witnesses sometimes lie,
14 witnesses do all sorts of things where, you know, it could
15 affect their credibility, but you look at the totality of the
16 evidence and you also look at what the role of that particular
17 statement is.

18 Here I have to tell you -- I have to tell you, and I think
19 you have admitted it, that it was a highly probative part of
20 the trial. Now --

21 **MS. CRITCHFIELD:** No, I don't admit that.

22 **THE COURT:** Well, that the statements were probative.
23 Or prejudicial. I don't know what the right word would be.

24 **MS. CRITCHFIELD:** Not in this context, I don't admit
25 that, no.

1 **THE COURT:** Really?

2 **MS. CRITCHFIELD:** Absolutely not.

3 **THE COURT:** Okay. All right. Fair enough. I don't
4 want to put words in your mouth. That's not appropriate for me
5 to do so.

6 **MR. SHAPIRO:** Younge --

7 **THE COURT:** Try to finish up.

8 **MR. SHAPIRO:** Younge testified that Quartermain told
9 him McIntosh wanted to buy a silencer. McIntosh ordered --
10 offered him \$55,000 to kill Ewing. Quartermain told Younge, "I
11 killed Ewing. McIntosh owes me money." He always included
12 Anthony in the statement. That was the whole case.

13 **MS. CRITCHFIELD:** But there was other evidence
14 corroborating --

15 **THE COURT:** Well, there always is other evidence --

16 **MS. CRITCHFIELD:** A lot of evidence, Your Honor.

17 **THE COURT:** Okay. I think I've actually sort of heard
18 the argument and now I have to go think about it.

19 **MS. CRITCHFIELD:** Would it be helpful for me to file
20 additional briefing on a --

21 **THE COURT:** I don't know yet.

22 **MS. CRITCHFIELD:** -- motion to dismiss?

23 **THE COURT:** You mean on the timeliness?

24 **MS. CRITCHFIELD:** On the timeliness issue and talk
25 about the delayed discovery and show you the evidence --

1 **THE COURT:** I don't know yet. I don't know.

2 **MS. CRITCHFIELD:** Okay.

3 **THE COURT:** Don't have an opinion. Want to wait.
4 Collect my thoughts. If you just want me to talk, I can talk,
5 but I don't think that's helpful. I think it's helpful if I
6 actually give some thought before I say something.

7 **MS. CRITCHFIELD:** Okay.

8 **THE COURT:** For a change. That would be a healthy
9 contrast. Yes. Okay. Thank you very much.

10 **MR. SHAPIRO:** Thank you, Your Honor.

11 **MS. CRITCHFIELD:** Thank you.

12 **THE COURT:** Thanks. Appreciate it.

13 (Proceedings adjourned at 10:56 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, March 30, 2017

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter